82-139

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACOBY & MEYERS, a partnership,

Appellant,

—VS.—

SUPREME COURT OF NEW JERSEY; ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OF THE SUPREME COURT OF NEW JERSEY; and NEW JERSEY STATE BAR ASSOCIATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does DR 2-102(C), a Rule of Discipline of the New Jersey Supreme Court, which prohibits the use of the firm name of a multi-state law firm in New Jersey, unless each "named" partner was or is a member of the New Jersey Bar, violate the First and Fourteenth Amendments (free speech), Article I, Section 8 (Commerce Clause), Article IV, Section 2 (Privileges and Immunities Clause), and Fourteenth Amendment (Equal Protection Clause) of the Constitution of the United States, as applied to a multi-state law firm,

Jacoby & Meyers, which seeks to add a New Jersey partner and open a New Jersey office staffed with New Jersey licensed counsel, and to continue to do business under its present firm name?

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Opinion 475 of the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey is reported at 107 New Jersey Law Journal 283 (April 2, 1981) - Appendix A.

The Opinion of the New Jersey Supreme Court is reported at 89 N.J. 74, 444 A.2d 1092 (N.J. April 28, 1982) - Appendix B.

JURISDICTION

This is a civil proceeding brought before the Supreme Court of New Jersey to attack the constitutionality of DR 2-102(C), a rule of Discipline promulgated by the

Supreme Court of New Jersey. Appellant first sought relief before the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, which rejected appellant's request on April 2, 1981. See 107 N.J.L.J. 283 (1981) (Appendix A). Although the Advisory Committee had no authority to consider constitutional challenges to rules adopted by the New Jersey Supreme Court, appellant first had to seek relief before the Advisory Committee.

Upon receipt of the adverse opinion, appellant promptly brought the appropriate proceeding

by petitioning the Supreme Court of New Jersey for relief. In its Petition filed with the Supreme Court of New Jersey appellant raised, and that Court considered, each of the constitutional challenges set forth herein.

According to New Jersey law and to a recent opinion of this Court, appellant utilized the proper procedure and appropriate forum for making its constitutional challenge to DR 2-102(C). In Middlesex County Ethics Committe v. Garden State Bar Ass'n., _____U.S. _____, _____ L.Ed. 2d _____, _____ S.Ct. _____50 U.S.L.W. 4712 (No.

81-460, June 21, 1982), this Court unanimously reversed the United States Court of Appeals for the Third Circuit and stated that the New Jersey Supreme Court, not the federal district court, was the appropriate forum for resolving constitutional challenges to disciplinary rules promulgated by the New Jersey Supreme Court.[1/]

[1/] The basis of this Court's ruling was the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971). In the Middlesex County Ethics Committee case the disciplinary proceeding had been instituted prior to the filing of the federal lawsuit. Here, in contrast, appellant chose to litigate the issue in the New Jersey Supreme Court. While appellant could have initially challenged DR 2-102(C) in (cont.)

On July 20, 1982, appellant filed a Notice of Appeal in the Supreme Court of New Jersey. Because appellant has challenged the constitutionality of a state rule, which challenge was rejected

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1/ (cont.)

the federal district court without even having to exhause state administrative remedies, see Patsy v. Board of Regents, ____U.S.____, ____L.Ed. 2d ____, ____S.Ct.____, ____U.S.L.W. ____ (No. 80-1874), June 21, 1982), It was free to make its challenge in the state courts instead of the federal courts. While not constitutionally compelled to do so, appellant pursued its remedy in the New Jersey Supreme Court, which this court recently stated was fully capable of considering federal constitutional claims. Middlesex County Ethics Committee v. Garden State Bar Ass'n., supra.

by the highest state court in which a decision could be had - the Supreme Court of New Jersey - this Court's appellate jurisdiction has properly been invoked. See 28 U.S.C. Section 1257(2).

For purposes of appellate review under 28 U.S.C. Section 1257(2) a disciplinary rule of a state supreme court is considered as a statute. See Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977). In Bates, the appellants challenged in the Arizona Supreme Court the constitutionality of a disciplinary rule adopted and

enforced by the Arizona Supreme Court. After that Court rejected their constitutional claims, appellants appealed to this Court, which first noted probable jurisdiction, 429 U.S. 812, 50 L.Ed.. 2d 73, 97 S.Ct. 53 (1976) and then reversed the Arizona Supreme Court on the First Amendment claim.

Other cases involving disciplinary rules which this Court has reviewed on appeal include Re R.M.J., _____U.S._____, 71 L. Ed. 2d 64, 102 S.Ct. 929 (1982); In re Primus, 436 U.S. 412, 56 L.Ed. 2d 417, 98 S.Ct. 1893 (1978); and

Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 56 L.Ed. 2d 444, 98 S.Ct. 1912 (1978).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

ARTICLE I, Section 8 (Commerce Clause):

> The Congress shall have power . . . to regulate commerce . . . among the several states. . . .

ARTICLE IV, Section 2 (Privileges and Immunities):

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. . . .

FIRST AMENDMENT (Free Speech):

> Congress shall make no law . . . abridging the freedom of speech. . . .

FOURTEENTH AMENDMENT (Free speech, due process, equal protection, privileges and immunities):

> 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DISCIPLINARY RULE 2-102(C) OF THE SUPREME COURT OF NEW JERSEY:

A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact

partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; provided, however, a firm

name may not be used in New Jersey unless all those named are or were members of the bar in New Jersey.

DR 2-102(D) OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE AMERICAN BAR ASSOCIATION:

A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make

clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

STATEMENT OF THE CASE

In 1972, Leonard Jacoby and Stephen Meyers, members of the California bar, formed a profit-making law firm (appellant) to serve a large middle-class clientele with basic, standardized legal services. Beginning in California,

appellant expanded considerably during the 1970's using media advertising and operating out of many neighborhood law offices staffed by local attorneys.[2/] In 1979, appellant opened neighborhood offices in New York under its California name, Jacoby & Meyers. A third partner, licensed to practice law in New York, oversees its operations there. Appellant

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[2/] For additional details concerning appellant's activities in California see Jacoby v. State Bar, 19 Cal. 3d 359, 138 Cal. Rptr. 77, 562 P.2d 1326 (1977), which anticipated this Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977).

currently has 75 offices and interviews over 500 clients per day, accepting about 600 new matters each week.

Appellant is the largest and oldest of the law firms in the country that specifically direct their practice toward the middle income client, and its name has recognition as such to the public and the legal community. The ability of appellant to provide quality legal services to the middle income consumer at reasonable and affordable prices depends upon streamlined office procedures that the firm has developed over the

years and uses in its neighborhood offices. The firm name is thus identifiable with its concept of and procedures for delivering legal services to the middle income client.

Appellant uses television advertising in New York that reaches consumers of legal services in New Jersey. In 1980, appellant notified appellee Advisory Committee on Professional Ethics of the Supreme Court of New Jersey that it wished to open a law office in New Jersey under its name, JACOBY & MEYERS.

Appellant advised appellee Committee that its New York letter-

head distinguished between the named partners, who were and are members of the California bar and the New York partner, Gail J. Koff, who was and is licensed in New York. Appellant stated that it would make any other adjustments required by the Committee to conform to the spirit of DR 2-102(C), a New Jersey Disciplinary Rule which prohibits the use of a law firm name in New Jersey ". . . unless all those named are or were members of the bar in New Jersey."[3/]

3/ The complete text of DR 2-102(C) is set forth supra at pages 10-12.

New Jersey's rule is in direct conflict with the Code of Professional Responsibility of the American Bar Association, which specifically provides that ". . . the same firm name may be used in each jurisdiction.[4/] On April 2, 1981, the appellee Advisory Committee rejected appellant's request in Ethics Opinion No. 475, 107 N.J.L.J. 283 (1981) (Appendix A). The following day, April 3, 1981, appellant instituted the appropriate civil proceeding

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[4/] The complete text of DR 2-102(D) of the Code of Professional Responsibility of the American Bar Association is set forth supra at pages 12-13.

in the Supreme Court of New Jersey, which has jurisdiction. Middlesex County Ethics Committee v. Garden State Bar Association, supra. Appellee Supreme Court of New Jersey granted a motion filed by appellee New Jersey State Bar Association to intervene to support DR 2-102(C).

Appellee Supreme Court of New Jersey conducted oral argument on October 5, 1981, and rendered its decision on April 28, 1982, which considered and rejected all of appellant's constitutional challenges to DR 2-102(C). Appellants having failed in the Supreme

Court of New Jersey, duly filed a Notice of Appeal so that this Court could consider the substantial federal constitutional challenges to DR 2-102(C).

THE QUESTION IS SUBSTANTIAL

The question presented by this appeal is substantial enough for this Court to note probable jurisdiction and render an opinion on the merits.

The number of national or multi-state law firms has grown to the point where it has become appropriate for this Court to resolve a matter that has received different responses throughout our

land. This Court has frequently reviewed cases involving lawyers and the practice of law.[5/] See, e.g., Re R.M.J., _____ U.S._____ 71 L.Ed. 2d 64, 102 S.Ct. 939 (1982); Branti v. Finkel, 445 U.S. 507, 63 L.Ed. 2d 574, 100 S.Ct. 1287 (1980); Leis v. Flynt, 439 U.S. U.S. 438, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979); In re Primus, 436 U.S. 412, 56 L.Ed. 2d 417, 98 S.Ct. 1893 (1978); Ohralik v. Ohio State Bar

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5/ Recently in Middlesex County Ethics Committee v. Garden State Bar Association, supra, this Court ruled that the federal district court should have abstained because the dispute was already being considered by the New Jersey Supreme Court.

Assn., 436 U.S. 447, 56 L.Ed 2d 444, 98 S.Ct. 1917 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed 2d 572, 95 S.Ct. 2009 (1975); United Transportation Union v. The State Bar of Michigan, 401 U.S. 576, 28 L.Ed. 2d 339, 91 S.Ct. 1076 (1971); Baird v. State Bar of Arizona, 401 U.S. 1, 27 L.Ed. 2d 639, 91 S.Ct. 702 (1971); United Mine Workers v. Illinois Bar Asso., 389 U.S. 217, 19 L.Ed. 2d 426, 88 S.Ct. 353 (1967); Brotherhood of Railroad Trainmen v. Virginia Ex Rel Virginia State Bar, 377 U.S. 1, 12 L.Ed. 2d 89, 84 S.Ct. 1113 (1964); NAACP v. Button, 371 U.S.

415, 9 L.Ed. 2d 405, 83 S.Ct. 328 (1963); Cohen v. Hurley, 366 U.S. 117, 6 L.Ed. 2d 1568, 81 S.Ct. 954 (1961); In re Anastaplo, 366 U.S. 82, 6 L.Ed 2d 135, 81 S.Ct. 978 (1961); Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.Ed. 2d 105, 81 S.Ct. 997 (1961). However, this Court has never ruled on the issue presented herein.

The rule is in direct conflict with the Code of Professional Responsibility of the American Bar Association, which specifically and expressly permits the use of a firm name in jurisdictions where not all of the named parties are licensed to practice. While

rules of the American Bar Association may not command the same respect as the Constitution they are not totally without significance. They are entitled to some consideration. See Hanrahan v. Hampton, 466 U.S. 1301, 64 L.Ed. 214, 100 S.Ct. 1868 (1980) (Justice Rehnquist denied recusal motion on basis of American Bar Association Code of Judicial Conduct).

While regulation of attorneys and the practice of law is primarily a matter for state regulation, this Court has not hesitated to invalidate state bar rules in conflict with the Constitution. See, e.g., Re R.M.J., _____U.S._____,

71 L.Ed. 64, 102 S.Ct. 929 (1982) and Bates v. Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977).

At this point, it is appropriate to analyze the specific constitutional provisions with which DR 2-102(C) is in conflict. Each raises substantial constitutional questions which this Court ought to answer.

A. DR 2-102(C) VIOLATES THE FREE SPEECH GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS.

This Court should decide whether the Supreme Court of New Jersey mistakenly relied upon this Court's 7-to-2 decision in Friedman v. Rogers, 440 U.S. 1, 59 L.Ed. 2d 100, 99 S.Ct. 887 (1979)

in upholding Rule 2-102(C). Friedman v. Rogers is only superficially similar to the instant case.

In Friedman v. Rogers, supra, this Court, in an opinion authored by Justice Powell, upheld a Texas statute which prohibited the practice of optometry under a trade name. However, the majority opinion carefully pointed out that the prohibition was a response to the extensive misuse of trade names by optometrists in Texas.

Indeed, the narrow scope of the holding in Friedman v. Rogers was recently recognized by this

Court in Re R.M.J., _____U.S._____, 71 L.Ed. 2d 64, 102 S.Ct. 929 (1982), where Justice Powell, this time writing for a unanimous Court, stated,

> . . . [I]n Friedman v. Rogers . . . we held that Texas could prohibit the use of trade names by optometrists particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names.

In contrast there is no evidence that law firms have ever engaged in the kind of deception

and abuse described by this Court in Friedman v. Rogers. Indeed, the trend, evidenced by the 1970 change in the Code of Professional Responsibility of the American Bar Association, is in the direction of multi-state law firms. Only New Jersey and Nevada prohibit the use of law firm names if one or more of the partners was or is not licensed in the state.

The New Jersey Supreme Court could point to no evidence of any abuse by law firms in any of the numerous jurisdictions throughout this land where multi-state law

firms are permitted to function. Instead, the court postulated hypothetical problems which have never occurred in the practice of law by multi-state law firms. For example, the New Jersey Supreme Court suggested that without the rule a client may believe Mr. Jacoby or Mr. Meyers might handle his or her case. To protect this hypothetical client, New Jersey says the rule is needed.

With all due respect, this is obviously not the basis for the rule. There is no evidence that in today's world clients have been disappointed by not meeting Mr.

Sullivan of Sullivan and Cromwell or Mr. Cravath of Cravath, Swaine & Moore.[6/]

Application of this Court's First Amendment - commercial speech analysis of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343 (1980) to New Jersey's rule reveals the real purpose of the rule: to protect New Jersey lawyers from competition. That this is the case is apparent

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6/ Sullivan and Cromwell and Cravath, Swaine & Moore are New York law firms.

from the fact that the names of deceased New Jersey lawyers may be used in a firm's name.[7/] If the New Jersey Supreme Court is concerned about the client who believes Mr. Jacoby or Mr. Meyers

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[7/] DR 2-102(B) permits the names of retired or deceased partners to remain in the firm's name. DR 2-102(B) provides in pertinent part:

> The name of a lawyer who assumes a judicial or other office or position and is thereby prohibited from practicing law or who ceases for reasons other than death or retirement to be associated with a law firm shall not be used in the firm name or in professional notices of or public communications by the firm.

will draft his Will, why is it not likewise concerned about the client who mistakenly believes a deceased former partner will draft his Will.

In Friedman v. Rogers, supra, this Court justified the total prohibition against trade names partly on the basis that Texas has a right to make sure prospective customers or patients do not mistakenly believe former optometrists who have long since departed still work for the company.

The Court made the point in these words:

> The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. . . .

Friedman v. Rogers, 440 U.S. 1, 13, 59 L.Ed. 2d 100, 112, 99 S.Ct. 887 (1979).

By permitting the names of former partners to remain in the firm name, the New Jersey Supreme Court allows this kind of "deception." Of course, appellant does

not believe it is deceptive, and neither does New Jersey. Moreover, New Jersey does not really believe the use of a multi-state law firm's name in New Jersey would be deceptive. The New Jersey Supreme Court does believe, however, that it would be competitive. The Court's concern about competition is revealed in its discussion about television advertising:

> . . . We do know that if petitioner were allowed to use its firm name in New Jersey in <u>any</u> form its television advertising could give it a substantial competitive advantage.
> Appendix B, pp. 41-42.

Having revealed the true purpose behind DR 2-102(C) and having pointed out that the stated purpose is false because New Jersey permits the names of deceased partners to remain, appellant now returns to the four part analysis of Central Hudson. That analysis establishes the conflict between DR 2-102(C) and the First Amendment: New Jersey does not have a substantial legitimate governmental interest (protecting New Jersey lawyers from competition is not legitimate); the rule does not directly advance New Jersey 's stated interest - prevention of deception.

While appellant believes the dissenting opinion of Justice Blackmun in Friedman v. Rogers is more persuasive than the majority, nevertheless, even the majority's opinion does not justify the ruling below. This Court should note probable jurisdiction in order to resolve the substantial question unanswered by Friedman v. Rogers, which recognized that this is an "unchartered area" of First Amendment law. Id., at 10, n. 9, 59 L.Ed. 2d 100, 110, 99 S.Ct. 887 (1979).

B. RULE DR 2-102(C) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has developed two different standards for determining whether a statute violates the Equal Protection Clause of the Fourteenth Amendment. If a statute does not make distinctions based on suspect classes, such as race or religion, or does not affect a fundamental right, such as free speech, then the distinctions made by the statute are to be upheld if rational. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530, 3 L.Ed. 2d 480, 79 S.Ct. 437 (1959), cited by the court below.

However, if free speech is implicated, the statute is to be subjected to strict scrutiny. See, e.g., Police Department v. Mosley, 408, U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972), where this Court struck down a Chicago ordinance which prohibited picketing near a school, but which exempted labor picketing from the ban. The Court "carefully scrutinized" (Id., at 99, 33 L.Ed. 2d at 218, 92 S.Ct. 2286) the ordinance and found it to be violative of the Equal Protection Clause.

The Court noted that "the equal protection claim" was "closely intertwined with First Amendment

interests . . ." Id. at 95, 33 L.Ed. 2d at 216, 92 S.Ct. 2286 (1972).

With this well established doctrine in mind we proceed to review the New Jersey Supreme Court's response to appellant's Equal Protection attack on the New Jersey rule that prohibits out-of-state atorneys' names from appearing in the firm name yet permits the names of long departed New Jersey attorneys to be retained by the law firms. The New Jersey Supreme Court arrived at the wrong conclusion because it applied the wrong standard of review. The Court assumed that there is no free

speech interest in a trade name and simply applied the rational basis test which is used to analyze statutes which do not involve fundamental rights or do not make distinctions on the basis of suspect classifications.

The New Jersey Supreme Court apparently misread this Court's opinion in Friedman v. Rogers, supra, which did not say that trade names are not speech. To the contrary, this Court recognized the commercial speech aspect of a trade name:

> . . . The use of trade names in connection with optometrical practice, then, is a form of

> commercial speech and nothing more.
>
> Id., at 11, 59 L.Ed. 2d at 111, 99 S.Ct. 887 (1979).

It is true that this Court, concluding that commercial speech is entitled to less protection under the First Amendment than political speech, went on to uphold the Texas ban against the use by optometrists of trade names. However, this Court did not say that trade names were not speech. Thus, the New Jersey Supreme Court erred in not applying the strict scrutiny test to its rules which distinguish between deceased

partners and out-of-state attorneys with respect to law firm names.

It does not matter that the form of speech involved herein - commercial speech, is less protected than political speech. This Court has applied the strict scrutiny test to forms of speech less protected by the First Amendment than pure political speech. For example, picketing per se has not been considered to be pure speech because of its physical nature. Yet, laws regulating picketing are subject to strict scrutiny analysis. See, Police Department v. Mosely, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972). Chicago's

ordinance prohibiting picketing near schools was not invalidated on First Amendment grounds; rather, it was struck down under the Fourteenth Amendment because "labor" picketing was exempt.

Similarly, this Court should strike down New Jersey's rule because it discriminates between former partners and out-of-state attorneys, permitting the names of the former and prohibiting the names of the latter. As stated earlier under the Free Speech argument, this Court recognized in Friedman v. Rogers the deceptive nature of a trade name which "reflects the reputation of an

optometrist no longer associated with the practice. . . ." Friedman v. Rogers, 440 U.S. at 13, 59 L.Ed. 2d at 112, 99 S.Ct. 887 (1979).[8/]

This Court should note probable jurisdiction to consider the substantial question of whether the strict scrutiny analysis of Police Department v. Mosely, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286

8/ As stated earlier, appellants disagree with the Court's decision in Friedman v. Rogers. However, it does support appellant's Equal Protection challenge here. If New Jersey wants to protect the public from deception it cannot permit deceased partners' names to remain. Of course, appellants do not believe this is the true purpose of the rule.

(1972) should be applied to commercial speech.[9/]

C. DR 2-102(C) VIOLATES THE COMMERCE CLAUSE.

This Court recognized in Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed. 2d 572, 95 S.Ct. 2004 (1975) that legal services are a part of interstate commerce. The Court ruled a Virginia fee schedule for attorneys to be in violation of the Sherman Act. However, as the New Jersey

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9/ Appellants also submit that under the rational basis test the rule is invalid. There is no rational basis for prohibiting out-to-state lawyers' names while permitting the names of deceased partners.

Supreme Court properly observed, this Court was careful to emphasize that it intended "no diminution of the authority of the State to regulate its professions." Id., at 793, 44 L.Ed. 2d at 588, 95 S.Ct. at 2016.

Left unanswered, however, was the question of whether a state could adopt rules for lawyers which were designed to protect them from out-of-state competition. The Supreme Court of New Jersey seems to have admitted it is concerned about competition:

> We do know that if petitioner were allowed

> to use its firm name in New Jersey in any form its television advertising could give it a substantial competitive advantage. (Emphasis in original) (Appendix B, pp. 41-42.)

Its comment, however, was made in the context of its First Amendment discussion. The New Jersey Supreme Court quickly forgot its concern about competition when it discussed the Commerce Clause issue. The court acknowledged this Court's ruling in Philadelphia v. New Jersey, 437 U.S. 617, 57 L.Ed. 2d 475, 98 S.Ct. 2531 (1978) that statutes enacted for the purpose of protecting local economic interests are virtually per se invalid. Thus, the New Jersey Supreme Court

failed to mention its concern about competition when it discussed the Commerce Clause issue. Expression of concern about competition in the context of the Commerce Clause discussion would have exposed the violation.

Instead, the New Jersey Supreme Court repeated its concern about protecting the public from deception, a concern already demonstrated herein to be without merit.

Now that the American Bar Association has recognized the propriety of multi-state law firms utilizing their firm names and numerous firms have taken advantage

of it, this Court should note probable jurisdiction to consider whether New Jersey, virtually alone on this point, may protect its own lawyers by interfering with the right of multi-state firms to use their names in New Jersey. This Court should decide whether New Jersey's rule is consistent with Goldfarb v. Virginia, supra, and Philadelphia v. New Jersey, supra.

D. DR 2-102(C) VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

The New Jersey Supreme Court, relying upon this Court as authority, correctly stated that

> The Privileges and Immunities Clause insures that non-residents and residents receive equal treatment with respect to 'fundamental' activities whose restriction would 'hinder the formation, the purpose, or development of a single union.'

Yet the court below went on to conclude that since the right to practice law is not a fundamental right, relying on Leis v. Flynt, 439 U.S. 438, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979) (5 to 4 opinion upholding refusal to permit New York lawyers to represent defendant in Ohio criminal case), appellant's challenge to DR 2-102(C) must fail.

With all due respect to the New Jersey Supreme Court, this case does not depend upon the issue of whether the right to practice law is a fundamental right.[10/] Rather, it depends upon the issue of whether a law firm has the right to use its own name - the same name it uses in other jurisdictions.

Since it relies upon television advertising, a right protected by the First Amendment, see Bates v. State Bar of Arizona, 433 U.S.

10/ Appellants do believe Justice Stevens' dissent in Leis v. Flynt, supra, is the better reasoned opinion than the majority.

350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977) and Columbia Broadcasting v. Democratic Comm., 412 U.S. 94, 36 L.Ed. 2d 772, 93 S.Ct. 2080 (1973), appellant should be able to use its own name in New Jersey. DR 2-102(C) does not prohibit appellant from operating in New Jersey. It just requires appellant to change its name.

Viewed in this light, it is clear that Leis v. Flynt, supra, is inapposite. At a minimum, there is a substantial question as to whether Leis v. Flynt, supra, supports New Jersey's rule against the use of appellant's name in New Jersey.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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